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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICHARD PETER PRIVITERA, Appellant.	)	2 CA-CR 2011-0055 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094044002

Honorable Richard S. Fields, Judge
Honorable John S. Leonardo, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Following a jury trial, appellant Richard Privitera was convicted of possession of marijuana for sale and money laundering in the second degree. He was sentenced to concurrent terms of imprisonment, the longer of which is three years. On appeal, he argues the trial court erred by precluding evidence in support of his defense of entrapment, by allowing expert testimony on an "ultimate conclusion of law," and by declining to give requested jury instructions. For the reasons that follow, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2009, Privitera acted as security for a transaction involving the sale of marijuana. The sellers were law enforcement officers, and after the exchange was made, Privitera and the others were arrested. Although Privitera was indicted with his codefendants, he was tried separately and convicted and sentenced as described above. This appeal followed.

Discussion

Entrapment Defense

¶3 Privitera first argues "[t]he trial court's refusal to allow [him] to present evidence regarding his entrapment defense denied him a full and fair trial in violation of his state and federal constitutional rights."[1] In support of his entrapment defense,

[1]The state argues Privitera has waived this issue on appeal for lack of argument. Although we decline to deem Privitera's argument waived, we remind counsel that a simple recitation of the law is not the kind of argument contemplated by the rules. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs must include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons

Privitera requested disclosure of the identity of the confidential informant who, Privitera contended, induced his participation. The court denied his request. Privitera later argued, following the state's motion to preclude certain evidence about its investigation, that he should be able to elicit such evidence to the extent it involved the confidential informant. But the court ruled he could not offer this evidence. Privitera asserts that these rulings precluded him from presenting evidence at trial in support of his defense and, therefore, effectively prevented him from advancing an entrapment defense.

¶4 We review for an abuse of discretion a trial court's rulings on the admissibility of evidence and on a motion to compel disclosure of a confidential informant's identity. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003); *State v. Tuell*, 112 Ariz. 340, 342-43, 541 P.2d 1142, 1144-45 (1975). To the extent evidentiary rulings impinge on a defendant's right to present a defense, we review this constitutional issue de novo. *See State v. Connor*, 215 Ariz. 553, ¶ 6, 161 P.3d 596, 600 (App. 2007).

¶5 To succeed on a claim of entrapment, a defendant must prove, inter alia, that "law enforcement officers or their agents urged and induced the person to commit the offense." A.R.S. § 13-206(B)(2). But Privitera testified that it was his codefendants who urged him to get into their truck and participate in the marijuana transaction. Because this evidence squarely contradicts any claim that the undercover officers or their

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therefor, with citations to the authorities, statutes and parts of the record relied on"). The arguments presented on appeal should include an application of the relevant case law to the facts of the case at hand sufficient to permit our review. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

confidential informant had induced his participation, Privitera could not have established an entrapment defense, and we therefore find no error.

Expert Testimony

¶6 Privitera next asserts the trial court erred by permitting a police officer's testimony "as to an ultimate conclusion of law." At trial, the officer testified that, given the amount of marijuana involved, it was "absolutely" for sale. But Privitera did not object until the filing of his motion for a new trial. And "an untimely objection first raised in a motion for a new trial does not preserve an issue for appeal." *State v. Davis*, 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010); *see also State v. Detrich*, 188 Ariz. 57, 64, 932 P.2d 1328, 1335 (1997) (purpose of requiring specific objection in trial court is to give court opportunity to rule or effect a remedy). Consequently, Privitera has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶7 Privitera's argument is waived, however, because he does not argue on appeal that the error is fundamental. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Moreover, as the state correctly notes, considerable Arizona case law supports the trial court's ruling. *See, e.g.*, *State v. Keener*, 110 Ariz. 462, 466, 520 P.2d 510, 514 (1974) (qualified expert may properly testify that, based on circumstances, defendant likely possessed drugs "for sale").

Requested Jury Instructions

¶8 Privitera contends the trial court erred by refusing to instruct the jury on certain lesser-included offenses and on state-destroyed evidence pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). We review for an abuse of discretion the denial of requested jury instructions, including a *Willits* instruction. *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005); *State v. Davis*, 205 Ariz. 174, ¶ 36, 68 P.3d 127, 133 (App. 2002).

Lesser-included Offenses

¶9 Privitera maintains the trial court should have granted his request to instruct the jury on simple possession and attempted possession of marijuana as lesser-included offenses of possession of marijuana for sale. An instruction on a lesser-included offense is required "if an offense is, in fact, a lesser-included offense of another, and the evidence supports giving the lesser-included instruction." *State v. Brown*, 204 Ariz. 405, ¶ 7, 64 P.3d 847, 850 (App. 2003); *see also* Ariz. R. Crim. P. 23.3. Evidence is sufficient to require a lesser-included offense instruction if the jury is "able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006). "[T]he evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Id.*; *see also State v. Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d 684, 689 (2009).

¶10 Here, the transaction involved fifty pounds of marijuana valued at $20,000. An officer testified that, given the quantity involved, this marijuana clearly was for sale. And Privitera himself testified that he knew he was participating in a drug sale that was to be the first of many. Given the evidence presented at trial, a rational juror could not have concluded that Privitera had only possessed or attempted to possess the marijuana for personal use instead. *See Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. Consequently, the trial court did not abuse its discretion by refusing to instruct the jury on the lesser-included offenses.

Lost or Destroyed Evidence

¶11 Privitera asserts a *Willits* instruction should have been given because the state deposited the confiscated money before allowing him to have the bills tested for fingerprints. "A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant." *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990). In order to merit a *Willits* instruction, a defendant must show: (1) "the state failed to preserve material evidence that was accessible and might tend to exonerate him" and (2) the failure to preserve the evidence resulted in prejudice to the defendant. *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). "Evidence must possess exculpatory value that is apparent before it is destroyed." *Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d at 133.

¶12 The state counters that an absence of fingerprints would not tend to exonerate Privitera because there are several possible scenarios in which Privitera could

be culpable without leaving recoverable fingerprints on the bills. We agree. Because the absence of his fingerprints on the bills would not necessarily tend to exonerate Privitera, the trial court did not abuse its discretion by refusing to give a *Willits* instruction.

Disposition

¶13 Privitera's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge